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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. ..... Miscellaneous

JESSIE A. KILPATRICK,

Petitioner,

—against—

THE TEXAS AND PACIFIC RAILWAY COMPANY,

Respondent,

Ex Parte JESSIE A. KILPATRICK,

Petitioner.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS OR CERTIORARI

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner, Jessie A. Kilpatrick, a resident of Alabama, moves the Court for leave to file the petition hereto annexed for a writ of mandamus or certiorari pursuant to Section 1651 (a) of the Judicial Code (28 U. S. C. A. 1651 (a)), and further moves that an order and rule be entered and issued directing the Honorable John C. Knox, United States District Judge for the Southern District of New York, to show cause why a writ of mandamus should not be issued in accordance with the prayer of the Petitioner.

and why the Petitioner should not have such other and further relief as may be just in the premises.

Dated: November 23, 1948.

JESSIE A. KILPATRICK,
Petitioner.

By: WILLIAM H. DEPARCQ
2535 Rand Tower
Minneapolis 2, Minnesota.

GERALD F. FINLEY and
ARNOLD B. ELKIND
545 Fifth Avenue
New York 17, N. Y.

Counsel for Petitioner

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. .....

JESSIE A. KILPATRICK,

Petitioner,

—against—

THE TEXAS AND PACIFIC RAILWAY COMPANY,

Respondent,

Ex Parte JESSIE A. KILPATRICK,

Petitioner.

PETITION FOR WRIT OF MANDAMUS OR CERTIORARI AND BRIEF IN SUPPORT THEREOF

Petition

Jessie A. Kilpatrick prays for the issuance of a writ of certiorari to the District Court of the United States for the Southern District of New York, or for a writ of mandamus to the Honorable John C. Knox, United States District Judge for the Southern District of New York, directing the nullification of an order of the Honorable John C. Knox entered in the office of the Clerk of the District Court for the Southern District of New York on November 22, 1948 (Appendix page iii), which order provides for a transfer of the files in this action from the Southern Dis-

trict of New York to the District Court of the United States for the Northern District of Texas, and this writ of mandamus is sought upon the ground that the District Court does not have the power to make such an order.

Summary Statement of Matter Involved

Principal Question Passed on by the District Court

The District Court determined that it was empowered by Section 1404 (a) of the Judicial Code (28 U. S. C. A. 1404 (a)) to order the transfer of a case brought there under the Federal Employers' Liability Act (45 U. S. C. A. 51-56), and therefore applied the doctrine of *forum non conveniens* for the purpose of directing a transfer although the Supreme Court had previously decided that the choice of venue could not be frustrated in such a case by the application of the doctrine of *forum non conveniens*.

Summary of Facts

The Petitioner, while employed in interstate commerce by The Texas and Pacific Railway Company at Big Spring, Texas, was involved in an accident on November 20, 1946, as a result of which he lost both his legs. He filed suit pursuant to the Federal Employers' Liability Act in the United States District Court for the Southern District of New York on December 23, 1946.

This Court is fully familiar with the proceedings there. The case was dismissed on July 16, 1947 (72 F. Supp. 635). An appeal was taken to the Circuit Court of Appeals and the judgment of dismissal was reversed on March 4, 1948 (C. C. A. 2, 166 F. (2d) 788). The railroad petitioned this Court for certiorari which was denied on October 11, 1948 (No. 73).

On September 12, 1947, approximately nine months after instituting the New York action, Petitioner filed an action in the United States District Court for the Northern District of Texas, which Petitioner sought to dismiss in March, 1948. The Petitioner's motion to dismiss his action in Texas was unconditionally denied, an appeal was taken to the Fifth Circuit Court of Appeals and this Court has before it undetermined a petition for a writ of certiorari to the Fifth Circuit Court of Appeals and for a writ of prohibition to the District Court for the Northern District of Texas (Miscellaneous No. 119, No. 275).

Basis of Court's Jurisdiction

The jurisdiction of this Court is invoked pursuant to Section 1651 (a) (28 U. S. C. A., 1651 (a)), which provides that the Supreme Court and all Congressional courts may issue all writs necessary or appropriate in aid of their respective jurisdictions agreeable to the usages and principles of law.

Questions Presented

The principal questions involved are:

(A) Whether this is an appropriate case for the Court to exercise its power to issue all necessary writs (28 U. S. C. A. 1651(a) in the light of the facts that

(a) the matter involved lies outside the issues of the case,

(b) that no decision of the suit on the merits can redress any injury done by the order,

(c) that unless it can be reviewed under Section 1651 (a) it can never be corrected without irreparable

prejudice to Petitioner even though beyond the power of the District Judge and

(d) that the question involved is whether the court below had the judicial power to order the transfer.

(B) Whether Section 1404 (a) empowers a District Judge to vitiate the venue selection of an injured workman suing under the Federal Employers' Liability Act by directing a transfer to a venue other than that of his original choice. District Judge Rayfiel in the Eastern District of New York has answered this question in the negative in *Pascarella* v. *New York Central*, decided November 19, 1948 (see opinion in Appendix, pp. xv to xxiii).

Reasons Relied on for Allowance of Writ

By the Federal Employers' Liability Act (45 U. S. C. A. 51-56). Congress has thrown a humanitarian protective mantle about the shoulders of the injured railroad employee, and one of the advantages given the railroad man to partially offset the disadvantages of having to sue his employer to recover damages for injuries received in industrial accidents and the requirement that negligence be established is the right or privilege of venue selection in any place where the railroad is found to be doing business. This right or privilege has proved in practice to be of immeasurable value to the injured employee in getting away from judges considered to be unsympathetic and getting before those considered to be more favorable, in escaping courts with burdensome procedures and seeking out courts where procedures made the going simpler, and in getting away from juries thought to be small-minded in the matter of verdicts and getting to those where he felt he could reap the richest harvest.

If District Judges have the power to order transfers of Federal Employers' Liability Act cases on the ground of convenience to witnesses, this specially conferred right or privilege is completely frustrated. The question involved therefore transcends the interest of the Petitioner here, who has since December of 1946 been thwarted in its exercise but is a matter of national importance to thousands of other injured railroad employees and their dependents, and men still to be injured.

The question involved here of whether or not the District Judge has the power to order the transfer lies wholly without any of the issues in this case. Assuming that the case proceeds in Texas pursuant to the order of transfer and that judgment is ultimately recovered, that judgment will not redress any injury done by the order even though the order may have been beyond the power of the District Judge.

Section 1651 (a) is not being invoked to correct a mere error in the exercise of judicial power. The contention of the Petitioner is rather that the court has no judicial power to do what it has done and that its action was not merely error but a usurpation of power. It is respectfully submitted, therefore, that this is precisely a situation for invoking the power of this Court under Section 1651 (a). Public interest, furthermore, suggests its speedy determination.

Prayer

For the reasons hereinabove set forth and discussed more in detail with supporting authorities in the accompanying brief, your Petitioner prays for a writ of certiorari to the District Court for the Southern District of New York or a writ of mandamus, or such other writ as to this Court may

seem just and appropriate, to be issued out of this Court directed to the Honorable John C. Knox, United States District Judge for the Southern District of New York, commanding and directing said District Judge to nullify his order of November 22, 1948 transferring this cause out of the Southern District of New York to the Northern District of Texas, to the end that the District Court of the United States for the Southern District of New York and a judge thereof and a jury shall hear and consider the issues between Jessie A. Kilpatrick and The Texas and Pacific Railway Company.

November 23, 1948

JESSIE A. KILPATRICK,
Petitioner.

By: WILLIAM H. DEPARCQ
2535 Rand Tower
Minneapolis 2, Minnesota.

GERALD F. FINLEY and
ARNOLD B. ELKIND
545 Fifth Avenue
New York 17, N. Y.

Counsel for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. ..... Miscellaneous

JESSIE A. KILPATRICK,

Petitioner,

—against—

THE TEXAS AND PACIFIC RAILWAY COMPANY,

Respondent,

Ex Parte JESSIE A. KILPATRICK,

Petitioner.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI OR MANDAMUS

Reported Opinions

The memorandum opinions of Judge Knox transferring this case to the Fort Worth Division of the United States District Court for the Northern District of Texas are dated November 12, 1948 and November 17, 1948. They are not officially reported but are printed in the Appendix hereto at pages i and ii.

There are also printed in the appendix representative divergent opinions of two District Judges, neither of which opinions is officially reported. The opinion of Judge Rayfiel of the United States District Court for the Eastern District

of New York, in *Pascarella* v. *New York Central Railroad Co.*, in which action Judge Rayfiel held that Section 1404 (a) is not applicable to actions brought under the Federal Employers' Liability Act, is printed in the Appendix (pp. xv to xxiii). The opinion of Judge Kaufman of the United States District Court for the Southern District of New York, in *Nunn* v. *Chicago, Milwaukee, St. Paul & Pacific R. R. Co.*, in which Judge Kaufman held that Section 1404 (a) was applicable to actions brought under the Federal Employers' Liability Act, is printed in the Appendix (pp. v to xiv).

The history and procedural background of the Kilpatrick litigation may be found by reference to the following published opinions and pending proceedings in this Court:

72 F. Supp. 632;
72 F. Supp. 635;
166 F. (2d) 788, cert. den. —— U. S. —— (October 11, 1948, No. 73).

The proceedings in which certiorari to the Second Circuit was denied by this Court were in "The Texas and Pacific Railway Company, Petitioner v. Jessie A. Kilpatrick, Respondent", being Nos. 839 and 840 in the October 1947 Term of this Court.

Other pending proceedings in this Court involving this litigation are Petitioner's Motion for Leave to File Petition for Writ of Certiorari to the Fifth Circuit Court of Appeals and for a Writ of Prohibition to the District Court for the Northern District of Texas, being Miscellaneous No. 119, the actual petition being numbered 275 in the October 1948 Term of this Court.

Specification of Errors

It is contended that the District Judge erred in assuming that Section 1404 (a) of the Judicial Code (28 U. S. C. A. 1404(a)), which became effective on September 1, 1948, conferred upon him the power to transfer this action to Texas for the convenience of witnesses in spite of the fact that this action was brought under the Federal Employers' Liability Act (45 U. S. C. A. 51-56).

ARGUMENT

Statutes Involved

The statute bearing on the jurisdiction of the Court to issue a writ is Section 1651 (a) of the Judicial Code (28 U. S. C. A. 1651 (a)), which reads as follows:

> "The Supreme Court and all courts established by act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions agreeable to the usages and principles of law."

If the Court grants its writ it will take the problem of construing whether Section 1404 (a) of the Judicial Code has application to cases brought pursuant to Section 6 of the Federal Employers' Liability Act. 1404 (a) of the Judicial Code, effective September 1, 1948 (28 U. S. C. A. 1404 (a)), provides as follows:

> "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been tried."

Section 6 of the Federal Employers' Liability Act (as amended in 1910 (45 U. S. C. A., 56)), in relevant part provides:

> "Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States, and no case arising under this chapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States."

POINT I

The Court should exercise its power to issue a writ to the District Court pursuant to Section 1651 (a) of the Judicial Code.

Section 1651 (a) carries with it the embodiment of former Section 262. The reviser's note to the new Section 1651 (a) states that the revised section is expressive of the construction recently placed upon such section by the Supreme Court in *U. S. Alkali Export Assn.* v. *U. S.*, 65 S. Ct. 1120, 325 U. S. 196 (1945) and *DeBeers Consol. Mines* v. *U. S.*, 65 S. Ct. 1130, 325 U. S. 212 (1945).

As is pointed out in *U. S. Alkali Assn.* v. *U. S., supra,* the judicial use of these writs both at common law and in the Federal courts have been in appropriate cases to confine inferior courts to the exercise of their prescribed jurisdiction or to compel them to exercise their authority when it is their duty to do so. The writ here is not sought

as a substitute for an authorized appeal. The question involved actually, as in the *DeBeers* case, *supra*, respects a matter lying wholly outside the issues in the case. Regardless of the ultimate verdict and judgment in this case, there will be no redress for the injury sustained by the plaintiff if in truth and in fact the court below lacked the power to issue the order of transfer. Petitioner is not asking this Court to review the question of whether or not the District Judge properly exercised his discretion in ordering this transfer; rather, the Petitioner contends that the Court had no judicial power but has instead usurped a power not available to it.

The situation which compelled this Court to issue a writ of certiorari to the District Court of the United States for the Southern District of New York in *DeBeers Consol. Mines* v. *U. S.*, 325 U. S. 212, 217, is not distinguishable in principle from the conditions here, with these additional factors:

(a) that the matter is of national importance to injured railroad employees throughout the country,

(b) that a prompt decision by this Court will prevent a dislocation of Federal Employers' Liability Act litigation throughout the United States,

(c) that in the particular case of this Petitioner it will enable the Court to pass on the question of whether, having established his right to bring an action in the Southern District of New York through two years of heart-breaking litigation, that choice is to be thwarted by the invocation of the doctrine of *forum non conveniens*,

(d) there are already differences of opinion between District Judges as to whether or not Section 1404 (a) is

to be applied to Federal Employers' Liability Act cases (compare the opinion of Judge Kaufman in the Southern District, decided on November 9, 1948, in *Nunn* v. *Chicago, Milwaukee, St. Paul & Pacific R.R. Co.*—Appendix pages v to xiv, with the decision of Judge Rayfiel in the Eastern District in *Pascarella* v. *New York Central R.R.*, decided on November 19, 1948—Appendix pages xv to xxiii), and

(c) lacking guidance from this Court District Judges and litigants under the Federal Employers' Liability Act will be left in a veritable maze of procedural problems to obtain appellate review.

Ex Parte Republic of Peru, 318 U. S. 578.

POINT II

The District Judge has usurped power not conferred upon him by Section 1404 (a) of the Judicial Code in ordering a transfer of an action brought under the Federal Employers' Liability Act.

The section which the learned jurist believed conferred upon him the authority to order a transfer of this action was Section 1404 (a) of Title 28. This section became effective on September 1, 1948 as the result of a passage by Congress of Chapter 646, Public Law 773, an act "to revise and codify".

Concentrated in that revision in Chapter 87 thereof, dealing with venue in the District Court, are many special venue provisions theretofore found in various statutes of the United States. These provisions are appropriately grouped and restated. Significant omissions are the venue provision of the Federal Employers' Liability Act, the venue provision of the Jones Act (46 U. S. C. A. 688)

and the venue provision of the Anti-Trust Laws (15 U. S. C. A. 1-7).

The learned jurist determined that because of the broad language of the section in the Judicial Code the authority conferred upon the court to transfer actions for the convenience of witnesses extended beyond those cases the venue provisions of which are restated in the Judicial Code and included Federal Employers' Liability Act cases. The result accomplished would be to effectively thwart one of the humanitarian purposes of the Federal Employers' Liability Act, and specifically the special venue provision therein contained which was hallowed by the interpretations of this Court as a valuable right or privilege intentionally conferred upon the injured workman by Congress.

Baltimore & Ohio R. Co. v. *Kepner*, 314 U. S. 44 (1941);

Miles v. *Illinois Central R.R. Co.*, 315 U. S. 698 (1942);

Gulf Oil Corporation v. *Gilbert*, 330 U. S. 501, 503 (1947);

Kilpatrick and Parker v. *The Texas and Pacific Railway Co.*, 166 F. (2d) 788 (1948); cert. den. —— U. S. ——, October 11, 1948;

Akerly v. *New York Central R.R. Co.*, 168 F. (2d) 812 (1948).

The District Judge in reading this section of the Judicial Code has closed his eyes to the purpose of the enactment, to the considerations evidenced in the affiliated statute and to the known temper of legislative opinion.

A

Purpose of the Enactment

The purpose of the enactment of the Code as a whole was, in addition to codification, to revise by substituting "plain language for awkward terms, reconciliation of conflicting laws, repeal of superseded sections and consolidation of related proceedings" (House Report 308, 80th Congress, 1st Sess., Title 28 Congressional Service, p. 1693).

What minor changes were made in the provisions regulating venue were made "in order to clarify ambiguities or reconcile conflicts" (id. p. 1697).

B

Considerations Evidenced in the Affiliated Statute

The Court closed its eyes to the considerations evidenced in the interpretation of Section 6 of the Federal Employers' Liability Act by the Supreme Court of the United States, which affirmed the humanitarian purpose of the Federal Employers' Liability Act and which posturized the venue provision therein as a plain grant of privilege not to be frustrated for the reasons which would authorize a transfer under 1404 (a). While it is true that Congress would have the power to frustrate the choice of venue, it should be abundantly clear that before that plain grant of privilege could be vitiated by Congress an amendment would, of necessity, be required to the Act in which were embodied all of the other laws concerning the rights and privileges of injured railroad employees. Then and then only should the learned jurist below have presumed that Congress had conferred upon him the power to impinge upon or revise or affect those special rights and privileges.

C

The Known Temper of Legislative Opinion

The District Court, in assuming that Congress intended to disturb the field of private rights between railroad employees and railroads otherwise reposed in the Federal Employers' Liability Act, overlooked that this particular field was one of the most controversial fields of private rights and that Congress, in connection with the Jennings Bill during the very session in which the revision of the Judicial Code was passed, failed to pass other legislation affecting the choice of venue under the Federal Employers' Liability Act. (See opinion of Judge Rayfiel in *Pascarella* v. *New York Central R. R. Co.*—Appendix, pages xv to xxiii).

In order to come to the conclusion that Section 1404 (a) was applicable the District Judge also had to disregard the applicable canon of construction against implied repeals (*Washington* v. *Miller*, 235 U. S. 422 (1914)), and many, many statements which were part of the legislative history of this enactment reported in Title 28, United States Code, Congressional Service, at pages 1676, 1941, 1945, 1950, 1972, 1981, 2019 and 2020. At these page references in the Congressional Service will be found the various assurances which were made to Congress that there was nothing in the proposed revision of the Judicial Code which was of a controversial nature, and which assurances induced Congress to pass the revision via the consent calendar and without debate. The interpretation placed upon 1404 (a) by the District Judge would, on the other hand, indicate that Congress had legislated on a most highly controversial subject.

The interpretation consistent with the representations made to Congress would be a codification of the rule expressed in *Gulf Oil Corporation* v. *Gilbert*, *supra*, which expressly excluded from the application of the doctrine of *forum non conveniens* actions brought pursuant to the special venue provision of the Federal Employers' Liability Act.

CONCLUSION

The Court should exercise its undeniable power to issue the writ sought and pass on this vitally important question of whether a Judge of the United States District Court now has the power to frustrate the selection of venue by an injured railroad employee.

Respectfully submitted,

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Counsel for Petitioner.

Dated: New York, November 23, 1948.

APPENDIX

Memorandum Opinion of Judge Knox dated November 12, 1948

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civil 40-170

JESSIE A. KILPATRICK,

Plaintiff,

—against—

THE TEXAS AND PACIFIC RAILWAY COMPANY, a corporation,

Defendant.

KNOX, *D.J.*

Plaintiff's motion for a preference is denied. Plaintiff's alternative application for an order striking the answer of the defendant in the event that the defendant proceeds to trial in an action brought by the plaintiff against the defendant in the District Court of the United States for the Northern District of Texas, is also denied. Upon cross-motion by the defendant, under authority of Section 1404 (a) of Title 28 of the United States Code, this case is transferred to the Fort Worth Division of the United States District Court for the Northern District of Texas. *Hayes v. Chicago, Rock Island and Pacific Railroad Co.*, D. C. Minn., September 25, 1948 (unpublished); *Nunn* v. *Chicago, Milwaukee, St. Paul and Pacific Railroad Co.*, S. D. N. Y., November 9, 1948 (unpublished).

JOHN C. KNOX
U. S. D. J.

November 12, 1948

Memorandum Opinion of Judge Knox dated November 17, 1940

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civil 40-170

JESSIE A. KILPATRICK,

Plaintiff,

—*vs.*—

THE TEXAS AND PACIFIC RAILWAY COMPANY, a corporation,

Defendant.

KNOX, *DJ*

Notwithstanding the affidavit of William H. DeParcq, dated November 9, 1948, and that of Gerald F. Finley, dated November 11, 1948, and which were filed herein subsequent to November 12, 1948, when my memorandum herein, with respect to defendant's motion to transfer this case to the United States District Court for the Northern District of Texas, for trial, was filed, I shall adhere to the rulings set forth in such memorandum.

The aforesaid affidavits have been read and considered, but I do not regard them as sufficient to warrant a change in my decision of November 12, 1948.

JOHN C. KNOX,
U. S. D. J.

November 17, 1948

Order of Judge Knox dated November 22, 1948

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civil 40-170

JESSIE A. KILPATRICK,

Plaintiff,

—against—

THE TEXAS AND PACIFIC RAILWAY COMPANY,

Defendant.

The plaintiff having moved this Court, by notice of motion dated October 27, 1948, for an order of trial preference setting the above entitled action for trial, to appear as the first case assigned on the jury trial calendar of this Court of Monday, November 8, 1948, and

The defendant, pursuant to the direction of Honorable John C. Knox, having moved this Court by notice of cross-motion dated November 3, 1948, for an order transferring this action, pursuant to Section 1404 (a) of Title 28 of the United States Code, to the United States District Court for the Northern District of Texas, Fort Worth Division thereof, and

The motions having duly come on to be heard on the 5th day of November, 1948 before Honorable John C. Knox, and the Court having heard counsel for the plaintiff in support of the plaintiff's motion and in opposition to the defendant's cross-motion and in opposition to the plain-

tiff's motion and due deliberation having been had thereon, and the Court having filed its opinions, dated November 12, 1948 and November 17, 1948, denying plaintiff's motion and granting defendant's cross-motion, it is,

ORDERED, that the motion of the plaintiff for an order of trial preference be, and the same hereby is, denied in all respects, and it is

FURTHER ORDERED, that the motion of the defendant be, and the same hereby is, in the exercise of this Court's judicial discretion in all respects granted, and the above entitled action be transferred to the United States District Court for the Northern District of Texas, Fort Worth Division, and that the Clerk of this Court, upon being presented with a copy of this order, shall during the week of January 17, 1949 forward all of the files in this action to the Clerk of the United States District Court for the Northern District of Texas, Fort Worth Division, together with a copy of this order, unless there shall be a further order of this Court or the Court of Appeals for the Second Circuit or the Supreme Court of the United States staying such direction and transfer.

Dated: November 22, 1948.

JOHN C. KNOX,
U. S. D. J.

Opinion by Judge Kaufman in Nunn v. Chicago, Milwaukee, St. Paul and Pacific R. Co., dated November 9, 1948

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civil No. 40-33

LLOYD B. NUNN,

Plaintiff,

—v.—

CHICAGO, MILWAUKEE, ST. PAUL and PACIFIC RAILROAD COMPANY, a corporation,

Defendants.

OPINION

APPEARANCES:

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GERALD F. FINLEY, ESQ.,
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Of Counsel.

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Attorney for Defendant,
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KAUFMAN, *J.*

Plaintiff, a resident of Des Moines, Iowa, sues to recover for injuries suffered in an accident near Clive, Iowa, while he was in the employ of defendant. Defendant moves to transfer the case to the District Court for the Southern District of Iowa, Central Division. The motion presents the question of whether or not the change of venue provision of the new Judicial Code, effective September 1, 1948, Title 28, United States Code, Section 1404 (a), is applicable to actions brought under Section 6 of the Federal Employers' Liability Act, 45 U. S. C. A. 56.

Title 28, United States Code, Section 1404 (a) provides:

> "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

Section 6 of the Federal Employers' Liability Act reads as follows:

> "Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. * * *"

There is no controversy here, as to the following facts. The defendant has no lines of operation in or near New York. While it does maintain a fiscal office and offices for the solicitation of business in the Southern District of New York, its railroading operations are confined to the Middle and Northwest United States. In order to defend the in-

stant action, it will be necessary for defendant to bring from Des Moines or its vicinity to New York, a distance of some 1200 miles, twelve important witnesses, eight of whom are in defendant's employ, and four of whom are physicians who, at one time or another, treated plaintiff for the injuries alleged to have been sustained by him as a result of the accident. Not only will the absence of these employees interfere with the functioning of defendant's line in its Iowa division and greatly inconvenience the physicians involved, but it is estimated that the cost of trying the suit here will be from $4,000 to $5,000, or approximately five times as much as if the case were prosecuted in Iowa. While the case, if left here, will soon go to trial, the calendar in the District Court for the Southern District of Iowa, Central Division, is current and up to date and the case, if transferred, will be heard about the first of next year.

Plaintiff does not dispute that the trial of this case may proceed with greater ease and expediency if venue were laid in a forum closer to the residence of both the suitors and the witnesses. Rather the claim is made that the nature of the venue privilege granted by Section 6 of the Federal Employers' Liability Act and its judicial construction by the Supreme Court render it unlikely that Section 1404 (a) of the new Judicial Code was intended to apply to actions brought under Section 6 of the Federal Employers' Liability Act. This contention is not well founded.

In *Baltimore & Ohio R. Co.* v. *Kepner*, 314 U. S. 44, the plaintiff, a resident of Ohio, brought suit in the Eastern District of New York under the Federal Employers' Liability Act to recover for injuries alleged to have been sustained by him. The railroad sought to enjoin the New York action by proceedings commenced in the State Court of Ohio. The Supreme Court held that the Federal Statute had created a privilege of venue which could not be frus-

trated by considerations of convenience or expense, and therefore a State Court, under its equity powers, could not enjoin an action begun in a distant federal forum in accordance with the provisions of the Act. A similar result was reached in *Miles* v. *Illinois Central R. Co.*, 315 U. S. 698, where it was held that Section 6 also precluded a State Court from enjoining, on considerations of annoyance, convenience and harassment, a Federal Employers' Liability action in the courts of a sister state. Finally, in *Gulf Oil Corp.* v. *Gilbert*, 330 U. S. 501, the Court declared (p. 505): "It is true that in cases under the Federal Employers' Liability Act we have held that plaintiff's choice of a forum cannot be defeated on the basis of *forum non conveniens*."

The foregoing cases are no longer controlling, or even applicable. Not only were they decided prior to the enactment of the new Judicial Code, when there was no provision of statute similar to 1404 (a), but the legislative history of Section 1404 (a) makes it abundantly clear that it was the very purpose of Congress, in enacting that section, to change the rule which had been approved by the decisions in those cases—a course indicated by the statement of the Supreme Court in the *Kepner* case, *supra*, p. 54, that if the rule "is deemed unjust, the remedy is legislative".

In considering the impact of Section 1404 (a) of Title 28 upon Section 6 of the Federal Employers' Liability Act, it must be recalled that Section 6 goes no further than to provide where the action "may be brought"; it does not say that the action, though properly "brought" in a certain forum, must remain there, and consequently, there is no inconsistency between that section and Section 1404 (a) of the Code authorizing a transfer for the convenience of parties and witnesses in "any civil action". Moreover, there is no room for suggestion that Congress, in enacting the

venue provisions of the new Code, did not have in mind the rights of those protected by the Federal Employers' Liability Act. Such a suggestion is refuted by the provisions of Section 1445 (a) of Title 28 relating to removal of actions, in which a general prohibition is laid down against the removal to the federal courts of civil actions brought in state courts under the Federal Employers' Liability Act.

The revisor's note to Section 1404 (a) is indicative of the intention of the legislature and reads as follows:

> "Subsection (a) was drafted in accordance with the doctrine of forum non conveniens, permitting transfer to a more convenient forum, even though the venue is proper. As an example of the need of such a provision, see Baltimore & Ohio R. Co. v. Kepner, 1941, 62 S. Ct. 6, 314 U. S. 44, 86 L. Ed. 28, which was prosecuted under the Federal Employer's Liability Act in New York, although the accident occurred and the employee resided in Ohio. The new subsection requires the court to determine that the transfer is necessary for convenience of the parties and witnesses, and further, that it is in the interest of justice to do so." Title 28, United States Code, Congressional Service, p. 1853.

The attention of the legislators was specifically directed to the revisor's notes with regard to contemplated changes in venue provisions in the new Judicial Code (H. Rep. 308, Title 28, United States Code, Congressional Service, p. 1692, at p. 1697, which accompanied H. R. 3214, later enacted into the new Code; Statement of Rep. Eugene J. Keogh, Hearing before Subcommittee No. 1 of the House Judiciary Committee on H. R. 1600 and H. R. 2055, Title 28, United States Code, Congressional Service, pp. 1947-1948) and Judge Galston, a Member of the Judicial Conference Committee

on Revision of the Judicial Code, refers to the *Kepner* case in connection with the drafting of the change of venue section (Galston, An Introduction to the New Federal Judicial Code, 8 F. R. D. 201, 206). These references to the *Kepner* case leave no doubt that the new Section 1404 (a) was enacted with the express purpose in mind of changing the pre-existing rule that in cases under the Federal Employers' Liability Act the plaintiff's choice of a forum could not be defeated on the basis of *forum non conveniens.*

Professor Moore, author of Moore's Federal Practice, and special consultant on the revision of the Judicial Code to the publishers of the United States Code, Annotated, speaking before the House Subcommittee holding hearings on H. R. 2055, the forerunner of H. R. 3214, the final draft of the new Code, indicated clearly the change made in venue provisions. He said:

> "Venue provisions have not been altered by the revision. Two changes of importance have, however, been made. Improper venue is no longer grounds for dismissal of an action in the Federal courts. Instead the district court is to transfer the case to the proper venue. See section 1406. And section 1404 introduces an element of convenience which gives the court the power to transfer a case for the convenience of parties and witnesses to another district. Both of these changes were in line with modern State practice; and the provision for change of venue on the grounds of convenience is also embodied in the Bankruptcy Act for corporate reorganization, section 118, Eleventh United States Code, section 518." (Hearings before Subcommittee No. 1 on H. R. 2055, Title 28, United States Code, Congressional Service, p. 1969.)

Professor Moore's views are weighty, not only because of his eminence in this field generally, but because, as consultant to the publishers of the Annotated Code, he was adviser to those who, in collaboration with the Congressional Committee on Revision of the Laws, were entrusted with the preparation of the bill which became Title 28 (See letter from Hon. Harvey T. Reid, Editor-in-Chief of West Publishing Co., Hearings before Subcommittee No. 1 on H. R. 2055, Title 28, United States Code, Congressional Service, 1971-1972; Remarks of Representative Sam Hobbs, Title 28, United States Code, Congressional Service, p. 1986, and Floor Discussion, id, p. 1993).

There is already authority for the application of Section 1404 (a) of the new Code to cases arising under Congressional statutes allowing the plaintiff the privilege of selecting his forum. While the Supreme Court, prior to the enactment of the new Code, in *United States* v. *National City Lines*, 334 U. S. 573, held that the judicial doctrine of *forum non conveniens* was not applicable to suits where venue is chosen pursuant to Section 12 of the Clayton Act, District Judge Yankwich in the District Court for the Southern District of California subsequently applied Section 1404 (a) in that very case and transferred the action to a district more suitable. *United States* v. *National City Lines*, 17 U. S. L. W. 2167 (October 12, 1948). Similarly, in an excellent opinion by Judges Nordbye and Joyce in the District Court of Minnesota, Section 1404 (a) has been held applicable to an action instituted to recover for injuries under the Federal Employers' Liability Act. *Hayes, et al.* v. *Chicago, Rock Island and Pacific Railroad Company* (unpublished opinion, District Court for the District of Minnesota, Fourth Division, September 25, 1948).

Plaintiff points out that the Jennings Bill,[1] also before the 80th Congress, and specifically designed to remedy the frequent inequity in bringing suits in distant and unsuitable forums under the venue provisions of the Federal Employers' Liability Act, was not enacted, and from this plaintiff argues that it cannot be assumed that Section 1404 (a) of the Judicial Code was intended to apply in such cases.

Why the Jennings Bill was not enacted, seems immaterial, but it is entirely possible that Congress felt such a law unnecessary for the very reason that such change as was deemed desirable would follow from Section 1404 (a) of the new Code. Moreover, the proposed Jennings Bill was in no sense a mere statutory enactment of the doctrine of *forum non conveniens*. It was designed to require suit to be brought in the jurisdiction in which the cause of action arose, or in which the person suffering death or injury resided at the time it arose, and to withdraw from the plaintiff any choice of forum except in cases where the de-

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1. The Jennings Bill provided that the second paragraph of Section 6 of The Federal Employers' Liability Act be amended by eliminating the broad power of the plaintiff to select the forum in which the action would be tried. It then proceeded to amend Section 51 of the old Judicial Code (28 U. S. C. 112) as follows:

"A civil suit for damages for wrongful death or personal injuries against any interstate common carrier by railroad may be brought only in a District Court of the United States or in a State Court of competent jurisdiction, in the district or county (parish), respectively, in which the cause of action arose, or where the person suffering death or injury resided at the time it arose:

"*Provided*, that if the defendant cannot be served with process issuing out of any of the Courts aforementioned, then and only then, the action may be brought in a District Court of the United States, or in a State Court of competent jurisdiction, at any place where the defendant shall be doing business at the time of the institution of said action."

The bill was passed by the House, 93 Cong. Rec., 9193, but only reached committee stage in the Senate.

fendant could not be reached with process in either of the two aforementioned jurisdictions. No such situation is created by the new Judicial Code. The plaintiff is still allowed, under Section 6 of the Federal Employers' Liability Act, to select, from all the forums in the country permitted him under the statute, that one which seems to him most preferable. But the legislative history of the Judicial Code and the broad language of Section 1404 (a) demonstrate that such choice on his part does not exempt him from the power of the court, after due consideration of the convenience of witnesses, parties and the interests of justice, to transfer the case to a more suitable place for trial.

The contention made by the plaintiff that the new Judicial Code was not intended to apply to pending actions is not sound. Not only would such a holding interject into every case in which the new Code is to be applied the extraneous, and sometimes difficult, issue of whether or not the case is "pending" [See *Truncale* v. *Universal Pictures Corp.*, 11 Fed. Rules Serv. 24 c 3, Case 1; *Russo* v. *Sofia Bros.*, 2 F. R. D. 80; *Liken* v. *Shaffer*, 64 F. Supp. 432; *Hackner* v. *Guaranty Trust Co. of New York*, 117 F. (2d) 95], but it would be contrary to the generally accepted rule that statutes relating to procedure apply to pending as well as future actions. *Railroad Co.* v. *Grant*, 98 U. S. 398; *Hallowell* v. *Commons*, 239 U. S. 506; *Benas* v. *Maher*, 128 F. (2d) 247. So far, the courts have treated the new Judicial Code in no different manner from any other procedural legislation in this respect. See *United States* v. *National City Lines, supra; Hayes, et al.* v. *Chicago, R. I. & P. Rd. Co., supra.*

Section 1404 (a) is applicable to this case, despite the fact that venue is laid under Section 6 of the Federal Employers' Liability Act. The facts plainly indicate that the transfer is necessary for the convenience of the parties and

witnesses and that it is in the interest of justice that the transfer be made. The case is therefore transferred to the District Court of the United States for the Southern District of Iowa, Central Division.

Plaintiff's cross-motion for injunction is denied. Settle order on notice.

November 9, 1948.

SAMUEL H. KAUFMAN
United States District Judge

Opinion of Judge Rayfiel in Pascarella v. New York Central dated November 19, 1948

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

Civil Action No. 8942

JOHN A. PASCARELLA,

Plaintiff,

—vs.—

THE NEW YORK CENTRAL RAILROAD COMPANY,

Defendant.

OPINION

APPEARANCES:

C. AUSTIN WHITE, ESQ.,
Attorney for Defendant,
For the Motion.

MESSRS. BLANK & BORDEN,
Attorneys for Plaintiff,

By WILLIAM A. BLANK, ESQ., of Counsel,
In opposition to Motion.

RAYFIEL, *D. J.*:

The plaintiff, an employee of the defendant railroad company, commenced this action under the Federal Em-

ployers' Liability Act (United States Code, Title 45, Sections 51 et seq.) to recover damages for injuries sustained by him during the course of his employment.

The defendant now moves for an order transferring the said action to the United States District Court for the Northern District of Ohio, Eastern Division thereof. The said motion is made pursuant to the provisions of Section 1404(a) of Title 28 of the United States Code, which became effective on September 1, 1948. The said section provides that a District Court may, "for the convenience of parties and witnesses, and in the interest of justice, transfer any civil action to any other district or division where it might have been brought."

The defendant states that the plaintiff, a resident of Ohio, suffered the injuries which are the subject matter of this action while working as a brakeman in Youngstown, Ohio; that the defendant expects to call as witnesses on the trial of the action several members of the train crew of which the plaintiff was a member, as well as several car inspectors and physicians, all of whom are employed or reside in or near Youngstown, Ohio; and that the United States District Court for the Northern District of Ohio, Eastern Division thereof, is held in the City of Youngstown, Ohio.

The plaintiff opposes this motion, contending, first, that the said Section 1404(a) does not apply to actions brought under the Federal Employers' Liability Act, and, second, that if it should be held that it does, then it is not applicable to actions pending on its effective date, to-wit, September 1, 1948.

For many years the doctrine of "forum non conveniens" has been enforced in the Federal Courts, but it has been uniformly held that it is inapplicable to actions brought under the Federal Employers' Liability Act. In the case of

Baltimore & Ohio R. R. Co. v. Kepner, 314 U. S. 44, the Court, referring to Section 6 of the said Act, said (at page 54), "* * * a privilege of venue granted by the legislative body which created this right of action cannot be frustrated by reasons of convenience or expense. If it is deemed unjust the remedy is legislative * * *". To the same general effect, see also *Miles* v. *Illinois Central R. R. Co.*, 315 U. S. 698, and *Gulf Oil Corporation* v. *Gilbert*, 330 U. S. 501. In the latter case, an ordinary tort action, not brought under the Federal Employers' Liability Act, the Court, in applying the doctrine of "forum non conveniens," said (at page 505), "It is true that in cases under the Federal Employers' Liability Act we have held that the plaintiff's choice of a forum cannot be defeated on the basis of 'forum non conveniens.' But this was because the special venue act under which these cases are brought was believed to require it". *Baltimore & Ohio R. R.* v. *Kepner*, 314 U. S. 44; *Miles* v. *Illinois Central R. R.*, 315 U. S. 698.

No question is raised as to this Court's jurisdiction of this action or of the parties. There are two questions involved here: first, whether Section 1404(a) of Title 28 of the United States Code applies to all civil actions, including actions brought under the Federal Employers' Liability Act; and, second, whether the defendant has established reasons of convenience of parties and witnesses which would justify the transfer of this action. If the first question is answered in the negative the second need not be considered.

Since no specific reference is made in the new Title 28 of the United States Code to actions brought under the Federal Employers' Liability Act, it becomes necessary to ascertain what the Congress intended when it enacted Section 1404(a) of Title 28 of the United States Code. All of the provisions of Title 28 of the new Code appear in one

chapter, headed "Chapter 87—District Courts; Venue," consisting of Sections 1391 to 1406, inclusive. The first section (1391) deals with venue generally, while several of the remaining sections contain provisions for venue in other specific civil actions, such as actions (1) by a national banking association against the comptroller of the currency, (2) to recover a fine, penalty or forfeiture, (3) for the collection of internal revenue taxes, and several others. It is my opinion that the provision in the said Section 1404(a) authorizing the District Court to transfer "*any* civil action * * *" (emphasis added) refers only to the civil actions enumerated under the aforementioned Chapter 87, and not to those actions for which special venue provisions and privileges are created by statute, except, of course, those venue statutes which were specifically repealed by the new Code.

Section 39 of the enacting act of New Federal Judicial Code reads in part as follows:

> "The sections or parts thereof of the Revised Statutes of the United States or statutes at large enumerated in the following schedule are hereby repealed."

There follows a schedule comprising many hundreds of sections of various statutes, but neither Section 6 nor any other provision of the Federal Employers' Liability Act appears among them.

Where the Congress did intend to make Section 1404(a) applicable to statutes containing specific venue provisions it accomplished that purpose in unmistakable language. For instance, it provided (by Section 1409(a) of Title 28, under the heading "Chapter 87—District Courts; Venue") that the transfer procedure effected by Section 1404(a)

should apply to copyright cases and consequently repealed Section 35 of Title 17, providing therefor.

An examination of the reviser's notes and the hearings and report of the committee which considered the bill which eventually became the New Federal Judicial Code, indicates that the various sections under Chapter 87 thereof (affecting venue), were intended to effect completeness or clarity in the statutes which they were designed to replace, or provided changes in the phraseology thereof. Specifically, Section 1404, according to the said notes, was a consolidation of Sections 119 and 163 of Title 28, U. S. C., 1940 Ed. with necessary changes in phraseology and substance, and neither of said sections referred to actions commenced under the Federal Employers' Liability Act. The mere reference in said notes to the case of *Baltimore & Ohio R. R. Co.* v. *Kepner*, *supra*, does not justify the conclusion that the Congress intended by said section to deprive an employee of a railroad of the special and substantive right of venue granted him by Section 6 of the Federal Employers' Liability Act.

Hon. John Jennings, Jr., a member of the House of Representatives, introduced a bill in the first session of the 80th Congress (H. R. 242) providing for the amendment of Section 6 of the Federal Employers' Liability Act, so as to limit venue in actions brought thereunder. Thereafter, but in the same session, he introduced a substitute bill (H. R. 1639) less drastic in its provisions, but designed to accomplish the same general purpose. It provided that in certain eventualities, which need not be here considered an action under the said Act could be brought only in the district or county in which the accident occurred, or in which the employee suffering injury or death resided at the time when the accident occurred.

At the opening of the hearings before the subcommittee of the Committee on the Judiciary of the House of Representatives, the sponsor of the bills asked that H. R. 242 be not considered, inasmuch as he was interested only in the passage of H. R. 1639. The hearings were quite extensive, and the record thereof consists in large part of the oral testimony of representatives of various Bar Associations and attorneys for several railroad companies, and copies of resolutions adopted by the Bar Associations of many of the states advocating the limitation of venue of actions commenced under the Federal Employers' Liability Act.

The general purport of the testimony and resolutions was to the effect there existed widespread solicitation of cases under the Act as well as other unethical practices, and that a comparatively small group of law firms, generally in the more populous states, represented employee plaintiffs in a substantial percentage of the cases brought thereunder. It was urged that the limitation of venue provided for in H. R. 1639 would eliminate or substantially reduce those evils. It was also urged by the proponents and supporters of the bill that the prosecution of these actions in large cities remote from the scene of the accidents has resulted in what were referred to as exorbitant verdicts for the employees. Opponents of the bill argued that if the first contention is correct, it would be more advisable and proper for the constituted authorities to institute disciplinary proceedings than to impose restrictions and limitations on the injured employee. As to the second contention, the bill's opponents criticised the standard which was employed to justify the opinion or conclusion that the verdicts were exorbitant. They urged, on the contrary, that the verdicts recovered in other jurisdictions provided entirely inadequate compensation for the injuries suffered by employees.

The Jennings bill was being considered by the Congress during the same period that it had the New Federal Judicial Code under advisement. The Jennings bill failed to pass the Congress. It seems fair to assume, therefore, that it was not the intent of the Congress to give such sweeping significance and import to Section 1404(a) of the New Federal Judicial Code as the defendant contends.

There are several additional facts and circumstances which in my judgment justify the opinion that it was not the intent of the Congress to apply Section 1404(a) of the New Federal Judicial Code to actions under the Federal Employers' Liability Act.

My distinguished colleague, District Judge Galston, a member of the Judicial Conference Committee on Revision of the Judicial Code, in his "Introduction to the New Federal Judicial Code," 8 Fed. Rules Decisions, 201, said:

> "As the title of the bill indicates, the object of the Congress was to revise and codify existing law. The temptation in so doing to incorporate new matter was at times very great; *but the rule of Exclusion stated in its broadest terms was to reject anything of a controversial nature.* In consequence the bill as it was introduced in the closing days of the second session of the 79th Congress expressed the efforts of the draftsmen to simplify, consolidate, rearrange, rephrase and indeed streamline former Title 28."

And then, further:

> *"The breadth of the survey of Titles other than Title 28 of the United States Code is indicated in the present act* in the schedule of laws repealed." (Emphasis added.)

Charles J. Zinn, Esq., Law Revision Counsel to the Committee on the Judiciary of the House of Representatives, in a statement made before the said Committee, said, inter alia (see pages 1980 and 1981 of the West Publishing Company's Publication—United States Code, Congressional Service—):

> "In the work of revision, principally codification, as we have done here, keeping revision to a minimum, I believe the rule of statutory construction is that a mere change of wording will not effect a change in meaning unless a clear intent to change the meaning is evidenced,"

and:

> "People who are afraid that we are changing the law to a great extent need not worry particularly about it."

At page 1945 of said publication Hon. Eugene J. Keogh, a member of the House of Representatives, and a former Chairman of the House Committee on the Revision of the Laws, said:

> "The policy that we adopted, which in my mind has been carefully followed by the revisers and by the staff of the publishing companies, was to avoid wherever possible the adoption in our revision of what might be described *as controversial substantive changes of law.*" (Emphasis added.)

Many other statements to the same general effect, made by members of Congress and others, appear in the said

publication and in the Report of the Committee and the record of the hearings held before it.

The failure to make specific reference to Section 6 of the Federal Employers' Liability Act, or at least to include the said section in the aforementioned schedule or table of laws repealed, appears to confirm the opinion of this Court that it was not the intent of the Congress to make Section 1404(a) of the New Federal Judicial Code applicable thereto.

The said Section 1404(a), except to the extent that it applies to those venue provisions contained in Chapter 87, aforementioned, merely makes statutory the doctrine of "forum non conveniens." To make it applicable to actions under the Federal Employers' Liability Act would be to negative the aforementioned decisions of the Supreme Court, and I am unwilling to agree that that was the intent of the Congress.

Granting venue rights under Section 6 of the Federal Employers' Liability Act was a meaningful and purposeful exercise of legislative prerogative by Congress, and should be taken away only by an equally specific discharge of its legislative function. I do not think that Section 1404(a) of the new code accomplished that purpose. The 81st Congress is about to meet in session, and will have an opportunity to clarify the situation here involved.

Since it is the opinion of this Court that Section 1404 (a) is not applicable to actions brought under the Federal Employers' Liability Act, it becomes unnecessary to consider the question of convenience raised by the defendant.

Accordingly, the motion is denied. Settle order on notice.

Dated: November 19, 1948

LEO F. RAYFIEL,
U. S. D. J.